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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Respondent.

Petition Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I. Should this Court's supervisory powers be exercised to correct the failure of a court of appeals to adhere to the law of the case doctrine, wherein it reversed its prior ruling on a case determinative issue, thereby requiring relitigation of the issue in multiple trials?

II. Do the fundamental principles of maritime law permit courts in salvage cases to divest intervening owners of all indicia of ownership in order to satisfy a salvage lien solely because the value of the property is enormous?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Atlantic Mutual Insurance Company, Salvage Association, London Assurance, Alliance Assurance Company, Ltd., Royal Exchange Assurance, Indemnity Marine Assurance Company, Ltd., Marine Insurance Company, Ltd., and the Superintendent of Insurance of the State of New York (collectively referred to as the "Underwriters") and the respondent, Columbus-America Discovery Group, Inc. ("CADG") and Jack F. Grimm and Joanne Lampe Charlton, Personal Representative of the Estate of Harry G. John, who were appellants in the court below.

Pursuant to Rule 29.1 of the Rules of the United States Supreme Court, the Court is advised that the following petitioners do not have any parent companies or any subsidiaries that are not wholly-owned:

Atlantic Mutual Insurance Company

Salvage Association

Superintendent of Insurance of the State of New York

The following are parent or subsidiary companies (not wholly owned) of the remaining petitioners:

- The London Assurance - Sun Alliance Group plc (parent), Protea Assurance Company Limited (subsidiary)
- Alliance Assurance Company, Ltd. - Sun Alliance Group plc (parent)
- Indemnity Marine Insurance, Ltd. - Commercial Union plc (parent)
- Royal Exchange Assurance - Guardian Royal Exchange Assurance plc (parent)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated June 14, 1995, is reported as

Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 56 F.3d 556 (4th Cir. 1995)(hereinafter "CADG II"), and is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion of the United States District Court for the Eastern District of Virginia dated November 18, 1993, is unreported and is reproduced at Pet. App. 74a. The Order entered January 13, 1994 approving the Marketing Plan is not published and is reproduced at Pet. App. 203a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated July 11, 1995, is not published and is reproduced at Pet. App. 402a.

The first opinion of the United States Court of Appeals for the Fourth Circuit dated August 26, 1992, is reported as *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 123 L.Ed. 2d 183, 113 S.Ct. 1625 (1993) (hereinafter "CADG I") and is reproduced at Pet. App. 217a. The order

of the Supreme Court of the United States of America denying the respondent's Petition for Writ of *Certiorari* dated March 22, 1993 is not published and is reproduced at Pet. App. 399a.

The first opinion of the United States District Court for the Eastern District of Virginia dated August 14, 1990, is reported as *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D. Va. 1990) *rev'd, in part, remanded, sub nom. Columbus-America Discovery Group v. Atlantic Mutual Ins. Co. et al.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 123 L.Ed. 2d 183, 113 S.Ct. 1625 (1993) and is reproduced at Pet. App. 322a. The Order of the United States Court of Appeals for the Fourth Circuit denying the Motion for Clarification dated April 4, 1994 is not published and is reproduced at Pet. App. 398a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated October 15,

1992 is not published and is reproduced at Pet. App. 404a.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1995. Pet. App. 1a. The court of appeals denied a timely Petition for Rehearing on July 11, 1995. Pet. App. 402a. The jurisdiction of the district court was based upon the maritime and admiralty jurisdiction established in 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

Supplemental Admiralty Rule C to the Federal Rules of Civil Procedure is set forth verbatim at Pet. App. 412a.

Supplemental Admiralty Rule E(9)(c) to the Federal Rules of Civil Procedure provides:

> All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

STATEMENT OF THE CASE

This case was filed as an *in rem* action under Supplemental Admiralty Rule C to enforce a maritime lien for salvage against the S.S. CENTRAL AMERICA and its cargo. The vessel sank in a hurricane in 1857, carrying a large commercial shipment of gold. In 1989, the salvor, Columbus-America Discovery Group (hereinafter "CADG"), gave notice of this action to some of the insurers of the

commercial shipment of gold. The insurers (hereinafter "Underwriters") promptly filed claims in the proceeding. The trial court bifurcated the proceedings: first to determine whether to apply the law of salvage or the law of finds and, second, to conduct a trial to determine an appropriate salvage award, in the event that salvage law applied.

In the first trial, Underwriters produced corporate documents, public records and other evidence proving that they insured the commercial shipment of gold, that they had paid claims, and thus became the owners of the gold worth $1,219,189 (1857 value). Pet. App. 264-66a. The district court found that the Underwriters had abandoned their interests, and awarded title of the commercial shipment of gold to CADG under the law of finds. Pet. App. 395-96a. The United States Court of Appeals for the Fourth Circuit affirmed the finding that the Underwriters had insured, paid claims on and became the owners of the commercial shipment of gold. Pet. App. 266a. The court, however,

reversed the district court's ruling that the Underwriters had abandoned their ownership interest and determined that the law of salvage, rather than the law of finds was appropriate and remanded the case to the district court to determine a proper salvage award and directed the lower court on remand to determine the *percentage* to which each underwriter was entitled. Pet. App. 274a.

On remand, the district court conducted a trial to determine an appropriate salvage award. A stipulation of the Underwriters was admitted into evidence which set out the percentage of the shipment of gold that each underwriter had insured. The district court awarded 90% of the recovered gold (Pet. App. 202a) and all of the silver aboard the CENTRAL AMERICA to CADG. Pet. App. 183a. Over objection by the Underwriters, the district court approved a marketing plan submitted by CADG which made CADG the "Central Authority" with sole control over marketing and sales of all of the recovered *res*. Pet. App. 205a.

On appeal of the second district court decision, the Fourth Circuit affirmed all of the district court's rulings in its second opinion and remanded the case for a determination of the *amount* each underwriter insured, requiring each underwriter to prove its ownership in the *res*. Pet. App. 16-17a.

REASONS FOR GRANTING THE WRIT

Ownership of the most valuable treasure in cargo history is the central issue in this litigation. It is an issue so basic, yet so crucial to this case, and other salvage cases which will follow, that it must be considered by this Honorable Court. The opinion below departs from fundamental principles of salvage law, creates a conflict among the courts of appeals on salvage awards and raises the issue of this Court's supervisory powers to enforce the law of the case doctrine.

The facts of this case are rather simple and typical of

salvage cases. CADG recovered the gold cargo aboard the S.S. CENTRAL AMERICA from the ocean floor and brought it before the United States District Court for the Eastern District of Virginia to assert its salvage lien pursuant to Supplemental Admiralty Rule C. In response to the salvor's Notice of Arrest, the Underwriters asserted their ownership interest in the cargo based upon claims paid at the time of the loss in 1857. The only unique factor in this case is the nature of the salved property. The gold cargo of bullion and coins was valued at approximately $1,200,000.00 in 1857. Today the property may be worth one hundred times this amount or more.

The Fourth Circuit's affirmance of a salvage award as a percentage of the proceeds of the sale of the *res*, without establishing a value of the salvage services, conflicts with the positions of the Fifth Circuit and the Eleventh Circuit as to proper salvage awards. Furthermore, the Fourth Circuit, by affirming the trial court's rulings that the Underwriters'

property must be sold to determine the amount of the salvage lien and that the marketing and sale of the Underwriters' property may be controlled and conducted exclusively by the salvor as "Central Authority," has divested the owners of all rights to the property in favor of the salvor. Although the Fourth Circuit refused to grant the salvor title to the treasure pursuant to the law of finds, the terms of the salvage award and judicial sale affirmed by the court have the same effect. Such a significant departure from traditional salvage law and admiralty rules should only occur at the approval of this Honorable Court.

This Court should grant the writ of *certiorari* because a failure to review the opinion below will result in the opinion remaining as binding precedent in the Fourth Circuit, which conflicts with precedent in other circuits. Based upon the opinion below, owners of lost property at sea will be deprived of all indicia of ownership, including the right to retain title to property in excess of the value of the salvage

award, the right to a specified salvage award determined by the court and the right to a proper judicial sale. The effect of these rulings has already become apparent, as treasure salvors continue to bring property within the jurisdiction of the Fourth Circuit, including the alleged salvors of the R.M.S. TITANIC,[1] and the R.M.S. LUSITANIA.[2] In order to promote fairness and uniformity in salvage cases and resolve a conflict which now exists in the various courts of appeals, it is necessary to correct the Fourth Circuit's failure to follow established principles of salvage law.

The Court should also use its supervisory powers to correct the Fourth Circuit's failure to adhere to the law of the case doctrine. Although the court claimed to have "clarified" its ruling in CADG I, the opinion below is a reversal of its

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[1] *Marex Titanic, Inc. and Titanic Ventures v. The Wrecked and Abandoned Vessel, Its Engines, Etc. Believed To Be The R.M.S. TITANIC*, 805 F. Supp. 375 (E.D. Va. 1992), *rev'd* 2 F.3d 544 (4th Cir. 1993).

[2] *F. Gregg Bemis, Jr. v. R.M.S. LUSITANIA*, 1995 AMC 1665 (E.D. Va. 1995).

prior ruling that the Underwriters paid the claims upon and became the owners of the commercial shipment of gold aboard the CENTRAL AMERICA. This extremely exhausting and expensive litigation has been needlessly prolonged by the court's reversal on this key ruling.[3] The

---

[3] The result to the Underwriters, which expended vast resources in the second proceeding in reliance on the first court of appeals decision, is beyond measure. The district court judge remarked that:

> more than two thousand pages of testimony was presented in the second trial together with numerous depositions, video tapes and some thousand exhibits. Counsel have filed extensive briefs and expended a full day in final oral argument.
>
> To give some idea of the amount of time and energy expended by the parties in an effort to establish their respective claims, briefs filed herein set forth that some 78 days were spent in taking depositions, 32 days before the 1990 trial and 46 days before the 1993 trial, transcribed into more than 11,400 pages. In fact, depositions and trial testimony of Thompson exceeds 2,400 pages. More than 40 bankers's boxes of documents were produced by plaintiff. A total of some 18 days were required for the 1990 and 1993 trials with some 4,000 pages of testimony.

Pet. App. 77-78a.

opinion below will result in relitigation in a third trial of an issue which has been fully litigated in two previous trials and conclusively determined by the Fourth Circuit in CADG I. This Court should summarily reverse the opinion below, or in the alternative, grant the Underwriters' petition for a writ of *certiorari* on this issue.

I. THE FOURTH CIRCUIT'S OPINION SHOULD BE CORRECTED BECAUSE IT FAILED TO FOLLOW THE LAW OF THE CASE ESTABLISHED IN ITS PRIOR OPINION WHICH HELD THAT THE UNDERWRITERS HAD ESTABLISHED THEIR OWNERSHIP INTERESTS IN THE COMMERCIAL SHIPMENT OF GOLD ABOARD THE S.S. CENTRAL AMERICA AND NO EXTRAORDINARY CIRCUMSTANCES EXISTED TO WARRANT SUCH FAILURE.

> No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered unless for clerical mistakes...

Ex parte Sibbald v. United States, 37 U.S. (12 Pet.) 488, 492 (1838).

A. The opinion below was a reversal of the court's prior decision and is a departure from the law of the case.

There is no question that the Fourth Circuit in CADG II reversed its ruling in CADG I that the Underwriters paid the claims and became the owners of the commercial shipment of gold. Pet. App. 266a. In CADG I, the court also remanded the case to determine the salvage award and the

percentage of the shipment of gold which each underwriter insured. Pet. App. 274-75a. The rulings and instructions on remand in the opinion below, CADG II, however, now require the Underwriters, individually, to prove ownership of the commercial shipment of gold, which will require introduction of the same evidence by Underwriters and rebuttal evidence by CADG in a third trial which was already introduced in the first two trials. Pet. App. 17a. This is clearly a departure from the law of the case established in CADG I.

In the first trial conducted in 1990, the district court held, *inter alia*, that the Underwriters had abandoned their ownership interests in the gold cargo. The court, therefore, applied the law of finds, declaring that CADG became the sole owner of the gold. Pet. App. 395-96a. The Fourth Circuit in CADG I, affirmed the ruling that the Underwriters were the owners of the gold (Pet. App. 266a), reversed the ruling on abandonment and ruled that the law of salvage,

rather than the law of finds was applicable. Pet. App. 274a.

In CADG I, the Fourth Circuit clearly ruled that the Underwriters were the owners of the gold. The court described in great detail the evidence which the Underwriters presented at trial to prove their ownership interests and acknowledged that:

> [o]n appeal, Columbus-America exerts much effort in asserting that there exists insufficient evidence to prove that the underwriters who are now parties in this litigation actually insured and paid off claims upon the gold.

Pet. App. 265a. In response to this allegation and appeal point, the Fourth Circuit held that:

> [s]till, we find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, *paid off claims upon and became the owners of the commercial shipment of gold in 1857.*

Pet. App. 266a. (emphasis added). The court explained further by stating that:

> [s]hould Columbus-America be able to prove, for example from a location on the ocean floor inconsistent with the bulk of the treasure, that certain gold was, more likely than not, passenger

> gold, rather than part of the insured shipment, this gold should be awarded to Columbus-America in its entirety. *Also, should more than $1,219,189 (1857 valuation) of gold be rescued, Columbus-America should be found the owner of any surplus.*

Pet. App. 264a n. 6 (emphasis added).

It is clear that in CADG I, the Fourth Circuit made distinct legal determinations relating to ownership of the commercial shipment. These determinations included a ruling that $1,219,189 of the commercial shipment of gold was insured, and that the Underwriters which were parties to this litigation had indeed paid claims and had become owners of that commercial shipment of gold. Based upon these findings, the Fourth Circuit set forth the following mandate:

> [o]n remand, the district court is to apply the law of salvage, and in so doing it must determine what *percentage* of the gold each underwriter insured. Equally, if not more, important, the Court must also determine the proper salvage award for Columbus-America.

Pet. App. 274-75a. (emphasis added). It is clear that the law of the case was that the Underwriters, collectively as a party, were found to have insured, paid claims upon and become

the owners of the commercial shipment of gold and that on remand, the district court was merely to determine the *percentage* of that commercial shipment which each underwriter insured.

Despite the many rulings in CADG I that ownership had been established, on the second appeal to the Fourth Circuit in CADG II, CADG again asserted that the Underwriters had not proven an ownership interest in the commercial shipment of gold. Pet. App. 16a. Although in CADG II, the Fourth Circuit stated that it clarified its prior ruling relating to ownership of the commercial shipment of gold (Pet. App. 71a), it is clear that such ruling is a reversal. In CADG II, the Fourth Circuit reversed its prior opinion by stating that the previous opinion should not be read to hold that a *prima facie* showing is all that is required of the Underwriters to prove their claims. Pet. App. 71a. The court further stated that "a claimant cannot prove his or her claim merely by filing a lawsuit." Pet. App. 71a. The court then issued the

following mandate and instructions on remand:

> [t]he district court must, therefore, *consider each underwriter's admissible evidence of the validity of its claim to a portion of the gold salvaged from the CENTRAL AMERICA. Columbus-America is entitled to introduce admissible evidence, if any, to rebut these claims... If the total amount of gold proved owned by the underwriters constitutes less than one hundred percent of the gold salvaged* -- either because the proof of ownership fails with regard to one or more underwriters, or because a significant portion of uninsured gold is recovered, or for any other reason -- Columbus-America may retain the excess.

Pet. App. 71-72a. (emphasis added).

This remand instruction is contrary to the court's ruling in CADG I that a *prima facie* showing of ownership had been made. "*Prima facie* case" is defined as "[s]uch as will prevail until contradicted and overcome by other evidence." BLACK'S LAW DICTIONARY 1189-90 (6th ed. 1990) *"Prima facie* evidence" is defined as "[e]vidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if

not rebutted or contradicted, will remain sufficient." *Id.* at 1190. Because a *prima facie* showing was made in CADG I, Underwriters clearly have produced evidence of ownership and should not in a third trial be required to present evidence to prove ownership again. CADG, in two previous trials, introduced evidence to rebut the ownership of the Underwriters.

It is significant that the instructions on remand are quite different in CADG I from those in CADG II.[4] In CADG I, after the Underwriters were declared to be the owners, the court instructed the district court on remand merely to

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[4] In CADG I, the Fourth Circuit instructed the district court:

> [s]hould Columbus-America be able to prove, for example, . . . that certain gold was, more likely than not, passenger gold, rather than part of the insured shipment, this gold should be awarded to Columbus-America in its entirety. Also, should more than $1,219,189 (1857 valuation) of gold be rescued, Columbus-America should be found the owner of any surplus.

Pet. App. 264a, n. 6.

determine what *percentage* of the entire commercial shipment each underwriter insured. Pet. App. 274a. Whereas, in CADG II, the court instructed the district court to consider evidence as to whether each underwriter can prove its ownership. Pet. App. 17a. In so doing, it is apparent that the Fourth Circuit reversed its prior opinion and potentially rendered the salvage trial a nullity.

Although the court attempts to cloak its turnabout as a "clarification," it was truly a reversal of its prior decision. In CADG II, the Fourth Circuit, with the exception of the ruling on abandonment, adopted the dissenting opinion of Judge Widener in CADG I. This shift, under the guise of "clarification," is impermissible. Despite the assertions of the Fourth Circuit, its opinion in CADG II is a direct reversal of its mandate in CADG I and thereby violates the law of the case doctrine.

B. **The Fourth Circuit was required to follow its ruling in CADG I that the Underwriters were the owners of the commercial shipment of gold which was the law of the case.**

This Court has explained that under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (*dictum*). *See also Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1987), *cert. denied*, 493 U.S. 822 (1989). The findings and rulings by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal. *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984). Once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case (*Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991)), including those by the appellate court which rendered the first decision. *See Knotts v. United States*, 893 F.2d 758,

761 (5th Cir. 1990). In *United States v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991), the court stated that:

> [w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand. If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.

(emphasis in original) (citation omitted).

The Fourth Circuit in CADG I, explicitly affirmed a finding by the district court that the Underwriters collectively had established that they owned the commercial shipment of gold.[5] The court also decided that the insured shipment was worth $1,219,189 (1857 valuation). Any variation from these findings in subsequent opinions by the Fourth Circuit in this

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[5] The Fourth Circuit stated:

> [s]till, we find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, *paid off claims upon and became owners of the commercial shipment of gold in 1857.*

Pet. App. 266a. (emphasis added).

case is a departure from the law of the case.

There was no reason for the Fourth Circuit to fail to adhere to its decision in CADG I. "The litany of exceptional circumstances sufficient to sidetrack the law of the case is not only short, but narrowly cabined." *United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991). Three reasons have been articulated for deviating from the law of the case. First, if a decision of the United States Supreme Court, directly in point, irreconcilable with the decision on the first appeal, was published between subsequent appeals, the decision of the Supreme Court must be followed despite the doctrine of the law of the case. *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). Second, the law of the case has been held to have no application where, in the interval between the two appeals, there has been a change in the law, by legislative enaction or judicial ruling. *Seattle v. Puget Sound Power & Light Co.*, 15 F.2d 794 (9th Cir.1926), *cert. denied*, 273 U.S. 752 (1927). Finally, absent

the first two criteria, the appellate court may reverse its previous decision *only* when such decision was clearly erroneous *and* works a manifest injustice. *Chicago, St. Paul, M & O Ry. Co. v. Kulp*, 102 F.2d 352 (8th Cir.), *cert. denied*, 307 U.S. 636 (1939).

"[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). Absent an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error and prevent manifest injustice, holdings of the appellate courts shall not be relitigated. *Doe v. New York City Department of Social Services*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). As discussed more fully in Section I.C., *infra*, none of these circumstances exist which warrant the court's departure from the law of the case.

The Fourth Circuit should be required to follow its prior

ruling in CADG I so that the parties need not relitigate the ownership issue, which has been conclusively decided. This Court has stated that the law of the case doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. at 816 (quoting 1B J. MOORE, J. LUCAS, & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.404[1], p. 118 (1984)). *See also Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989) (the law of the case "is a rule based on sound public policy that litigation should come to an end,... and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided."). This Court has stated that:

> [t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Arizona v. California, 460 U.S. 605, 619 (1983) (quoting *Montana v. United States*, 440 U.S. 147, 153-154 (1979)). Clearly, the issue of ownership was fully litigated in the first trial, decided by the trial court and affirmed by the court of appeals. A third trial to determine this issue is unnecessary, vexatious, will destroy reliance on judicial action and will most certainly result in a third appeal.

In *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) the Eleventh Circuit stated that:

> [t]he law of the case doctrine, self-imposed by the courts, operates to create efficiency, finality and obedience within the judicial system. . . . Due process, as a constitutional value, may be the cornerstone, but finality and stability, as institutional values, may be of equal importance. While the law of the case doctrine is not an "inexorable command,"... adherence to it helps to ensure that the essential elements are maintained in the process. Failure to honor its commands can only result in chaos.

(footnotes and citations omitted). The failure of the Fourth Circuit to adhere to the law of the case is a denial of due

process and will result in chaos.

C. No exceptional circumstances existed to warrant the Fourth Circuit's departure from the law of the case.

The decision on a question presented in an appeal is the law of the case and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works a manifest injustice. *Chicago, St. Paul, M & O Ry. Co. v. Kulp*, 102 F.2d 352 (8th Cir.), *cert. denied*, 307 U.S. 636 (1939). The Fourth Circuit's determination that the Underwriters were the owners of $1,219,189 worth of gold cargo was not clearly erroneous.

Even if the court determined that it misunderstood or overstated the district court's findings on ownership, the ruling in CADG I must stand as it was not clearly erroneous. This is particularly so where, as here, the evidence which was introduced by both parties in the first trial on the ownership

issue supports the ruling. The court reviewed the trial evidence and listed several documents which contained evidence of ownership. Included in this list were underwriter disaster books, Board resolutions to pay claims, minutes of board meetings, studies prepared by the New York Board of Underwriters, salvage contracts and newspaper reports. Pet. App. 281-82a.

In addition, CADG put the issue of ownership squarely before the Fourth Circuit in CADG I. The Fourth Circuit acknowledged that CADG asserted that insufficient evidence existed to prove that the Underwriters actually insured and paid off claims on the gold. Pet. App. 265a. In response to this assertion, the court recounted the varied testimony and documents admitted at trial in support of ownership and concluded by determining that the trial court did not err in its necessary finding that "the underwriters paid off claims upon and became the owners of the commercial shipment of gold in 1857." Pet. App. 266a. This finding was far from

"clearly erroneous", as the evidence clearly proved that these Underwriters were, indeed, the subrogated owners of the gold cargo.

Furthermore, the court chose not to revisit the opinion in response to CADG's petition for rehearing in which the issue of ownership was squarely addressed by CADG. Pet. App. 404a. In addition, CADG filed a Motion for Clarification with the Fourth Circuit after the second district court opinion, seeking a clarification of the ownership issue and requesting that the court remand the matter to the district court to determine the amount of gold each underwriter insured. The court denied the motion, finding that it lacked merit. Pet. App. 398a.

In describing "clearly erroneous," the Seventh Circuit opined that this standard was "more than just maybe or probably wrong; it must strike us as wrong with the force of a five-week-old, unrefrigerated dead fish... the...decision must be dead wrong..." *Parts & Electric Motors, Inc. v. Sterling*

Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989); *see also City Public Service Board v. General Electric Co.*, 935 F.2d 78, 82 (5th Cir. 1991); *Reid v. Rolling Fork Public Utility District*, 979 F.2d 1084 (5th Cir. 1992). The majority's opinion in CADG I was far from dead wrong, but rather, was supported by the evidence.

Furthermore, the decision did not result in a manifest injustice. The Fourth Circuit's mandate in CADG I resulted in a trial court judgment which awarded 90% of the recovered gold cargo to CADG in the salvage trial. It is rare indeed when a judgment which awards a plaintiff 90% of its claim could be deemed manifestly unjust. In fact, this judgment will surely result in the largest salvage award in recorded history.

It is manifestly unjust, however, to the Underwriters, each of which did its part to replace the value of the lost gold aboard the CENTRAL AMERICA, and thereby minimize the

impact of the Panic of 1857, that they be required to endure three trials, and likely three appeals, merely to establish that the claims they paid to avert economic catastrophe were actually made. Because this threshold issue was already established as the law of the case in CADG I, it must be upheld. In reliance on this ruling, the Underwriters expended enormous resources on the salvage trial, which may be rendered a nullity by the opinion below.

II. THE OPINION BELOW SUBSTANTIALLY DEVIATES FROM ESTABLISHED SALVAGE LAW PRINCIPLES REGARDING OWNERSHIP OF THE *RES*, DETERMINATION OF THE SALVAGE AWARD AND SALE OF THE *RES*.

> When property has been sunk at sea or lies wrecked near the shore the owner has not been divested of title by virtue of that fact. And neither does the salvor gain title by finding it. It is his obligation to bring the salved property before an admiralty court (unless amicable agreement is reached with the owner) where the owner will be given an opportunity to come in and claim the property. The salvor by bringing his salvage complaint and by having the recovered property arrested by the marshal, is enabled to take the necessary steps for securing his reward. Thereafter, (particularly if the

> owner fails to appear and claim his property, or make suitable arrangements for the salvor's compensation) the property can be sold by the marshal on order of the court. The proceeds of the sale is placed in the registry of the court (after deduction of legal expenses and fees) for distribution to the salvor and the owner of the salved property.

3A BENEDICT ON ADMIRALTY § 150.

A. The salvage award violates the principles of salvage law because it awards a portion of the salved property to the salvor and because it fails to establish a precise dollar amount for the salvage award.

The trial court's failure to establish a salvage award in a precise amount deprived the Underwriters of their ownership rights, contrary to the traditional law of salvage. The Fourth Circuit's mandate in CADG I remanded the case to the trial court to determine a salvage award. Following the second trial, the court made the following salvage award:

> [o]f more importance is the revelation that the quantity of the gold insured is only $1,219,189, of a bullion value today of some $21 million and even if marketed at substantial times its bullion value, it would not permit an adequate or liberal award. What a pity it did not

> amount to a billion dollars so that a proper award could have been given. Under all the facts and circumstances, the salvors are awarded ninety (90) percent of the salvaged gold and Underwriters awarded ten (10) percent.

Pet. App. 201-02a.

This ruling by the trial court, and affirmed by the Fourth Circuit in CADG II, significantly deviates from salvage principles. The most glaring deviation is found in the final sentence where the trial judge awards to the salvor "ninety (90) percent of the salvaged gold." Bound by the Fourth Circuit's ruling in CADG I that the gold was not abandoned, the judge, pursuant to existing law, had no authority to award the gold to the salvor. This statement reveals a significant departure from salvage law, under which the salvor is not entitled to be awarded any portion of the gold. In addition, by framing the salvage award as a right to the gold, the court failed to establish a dollar value for the services rendered, which values the maritime lien. By failing to establish a specific salvage award, the owner of the salved property is

prevented from paying the amount of the lien and thereby avoid judicial sale of the *res*.

The Fourth Circuit's decision is in conflict with the Fifth and Eleventh Circuit's position on salvage awards. In *Platoro Ltd., Inc. v. Unidentified Remains*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), the trial court did not establish a discrete salvage award, but instead, held that the salvor of sunken treasure was entitled to a salvage award at least equal to the value of the *res*. The trial court ordered the substitute custodian, the State of Texas, to surrender the *res* to the salvor or have it sold by the court with the entire proceeds being paid to the salvor. *Id.* at 902. The Fifth Circuit reversed the trial court's finding, stating:

> [w]e cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars, except where the salvage award was made alternatively with an award of the title to the *res* under the law of finds. In this case, where Texas has a strong interest in keeping the *res* because of its historical significance to the State, it is particularly inequitable to compel its sale at this juncture.

On remand, the district court should establish a

> dollar value for the *res* as recovered, and use that in its consideration of the factors on which a salvage award is based. The court should arrive at a dollar figure for the total value of the salvage services rendered, which should not exceed the value of the *res*.

Id. at 903-04 (citations omitted).

Soon after the decision in *Platoro*, the trial court in *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985), was faced with a treasure salvage case where the salvor was seeking title to the *res*. The trial court held that only under the law of finds may title to the *res* be granted. *Id.* at 808. The court opined that it would be violative of underlying salvage law principles to award title to the *res* because salvage law assumes that title to the personalty remains in the owner. Therefore, the trial court declined to award the *res in specie*. *Id.* at 808.

The foundation of salvage law requires that the salvors are acting to return property to its owners, not to return it for the salvors' use and benefit. In *The Joseph Stewart*, 1

Crabbe 218, 22 F. Cas. 582, 583 Case No. 13,070, (E.D. Pa. 1838) the court stated:

> [t]he difficulty in this case arises, not in estimating the nature and value of the service, nor in ascertaining * * * a rule of proportion for the reward of such a service. * * * Here the fund is so small that the whole of it, distributed among these 13 salvors, could hardly be considered an extravagant reward for their services. Yet we have no authority to treat this as a derelict. * * * Indeed, the libelants claim as salvors, not as finders of property which had no owner; they ask for salvage, for a reward out of the property saved, for their services in saving it. The very nature of this claim is a demand on the owner, for a reasonable compensation, for the service rendered to him in rescuing his property from total loss; but if the salvors are to take all, the loss would be as total, to the owner, as if his property had been swallowed up by the sea. It would be manifestly absurd to call upon the owner with such a demand, to restore him no part of the property saved, but to tell him they must have all for saving the rest.

The Fourth Circuit has completely denied the Underwriters the possession and control over property which lawfully is owned by the Underwriters. The sale of the *res*, through the court-approved marketing plan, is only necessary because a precise salvage award was not determined in this

litigation. After a search of hundreds of salvage cases, these petitioners have uncovered not a single case where a salvage award was based on the percentage of the proceeds of a judicial sale which had not occurred before the award or did not involve abandoned property. 3A BENEDICT ON ADMIRALTY App. D. (documenting American salvage cases from the Eighteenth Century to present). The Fourth Circuit's affirmance of the salvage award in this case is not only a radical departure from traditional salvage law, but also conflicts with the positions of the Fifth and Eleventh Circuits.

B. The affirmance of a marketing plan which provides the salvor the sole and exclusive right to market and sell the *res* is contrary to fundamental principles of salvage law and Supplemental Admiralty Rules.

The Fourth Circuit affirmed a marketing plan which allowed the salvor to maintain exclusive possession and control over the gold recovered from the CENTRAL AMERICA and authorized the salvor as the sole marketing

agent of the gold. Pet. App. 203-205a. This ruling, which has the effect of transferring title to the salvor, deviates from the very foundations of salvage law. Absent a finding of abandonment, the title to salved property remains with the true owner. There are well settled principles of salvage law which specify the rights of the parties and distribution of the *res*:

> [w]hen property has been sunk at sea or lies wrecked near the shore the owner has not been divested of title by virtue of that fact. And neither does the salvor gain title by finding it. . . . Thereafter, (particularly if the owner fails to appear and claim his property, or make suitable arrangements for the salvor's compensation) the property can be sold by the marshal on order of the court. The proceeds of the sale is placed in the registry of the court (after deduction of legal expenses and fees) for distribution to the salvor and the owner of the salved property.
>
> The salvor can purchase the property at the sale, if he so wishes, and can acquire title like any other purchaser in good faith.

3A BENEDICT ON ADMIRALTY § 150. The Fourth Circuit, however, made it clear that it departed from these principles because of the value of the *res*, by stating that:

> [t]he difficulty in this case, however, is that there is just too much gold involved to allow more than one party to market it. The loss of the gold aboard the CENTRAL AMERICA significantly affected the precious metal and financial markets in 1857, and there is evidence that the gold's recovery could, upon its re-entry into the market, have a significant effect today.

Pet. App. 65a.

Furthermore, the Fourth Circuit's opinion in CADG II reveals a complete reconstruction of salvage law. The court stated that:

> [t]o the extent that Columbus-America's designation as the central marketing authority for all of the gold appears to unduly interfere with the underwriters' ownership rights, it must be remembered that separate marketing of the gold would be less efficient and inevitably result in a lower total return. Thus, Columbus-America would be left with nine-tenths of a smaller pie, to the detriment of *their* eventual ownership rights.

Pet. App. 66a, n. 24. (emphasis in original). This rationale clearly shows how a departure from traditional salvage procedures can result in total divestiture of the rights of ownership. Applying existing salvage law, CADG should *not* acquire an ownership interest in any portion of the *res* at any

time during this action. Ownership of the cargo remains with the Underwriters until it is sold at a judicial sale, at which time ownership rights will be transferred to the purchaser. Therefore, under existing law, CADG has no "eventual ownership rights" which can be diminished by the marketing of the *res*. CADG is entitled to be paid a proper award for salvage services, and the law does not require that the *res* be liquidated to satisfy that award unless the property owner is unable to pay the award otherwise.[6]

Furthermore, the procedure affirmed by the court permits the salvor to essentially engage in a private sale of the *res* without the consent of the owners, in violation of Supplemental Admiralty Rule E(9)(c), which provides as follows:

> [a]ll sales of property shall be made by the marshal or a deputy marshal, or by other person or

---

[6] The owner who has retained title to the salved property and desires to have his vessel returned is subordinated to the lien of the salvors. 3A BENEDICT ON ADMIRALTY § 143; *Hamburg-American Line v. United States*, 168 F.2d 47 (1st Cir. 1948).

> organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

It is clear from this provision that judicial sales are to be conducted by an impartial third party, whether it is the marshal or some other person or organization retained by the marshal to perform tasks typically performed by the Marshals' Service. The rule clearly provides that the sale shall not by made by "a party in interest." The Fourth Circuit has clearly expanded this provision by affirming the trial court's decision to appoint the salvor as the sole marketing authority.[7]

The court's marketing ruling effectively negated the ownership interest of the Underwriters. It has long been the

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[7] In addition, it is the marshal's position that only a marshal's public auction conveys to the buyer a "clean" title, which extinguishes all maritime liens known and unknown. 5 BENEDICT ON ADMIRALTY § 39. Therefore, to ensure a maximum return for the gold, it should be sold at public auction.

purpose of salvage law to return lost property into the stream of commerce. *Ocean Services Towing and Salvage, Inc. v. Brown*, 810 F. Supp. 1258 (S.D. Fla. 1993). In the case of cargo, this property is best returned to the stream of commerce by way of the cargo owner, not judicial sale. It is unjust and inequitable that the Underwriters, having paid claims over a century and half ago, are now denied all rights of ownership in the cargo they insured.

The decision, which grants the salvor sole possession and control over the cargo and the exclusive right to market and sell the *res* is clearly a departure from salvage law and admiralty rules. The Underwriters are unaware of another salvage award which has so disenfranchised the lawful owner of property. The rationale for this incredible decision was based, in part, on the premise that the salvor could only receive maximum value for the *res* if it was marketed and sold by the salvor alone. This clearly should not be sufficient justification for abandoning established judicial

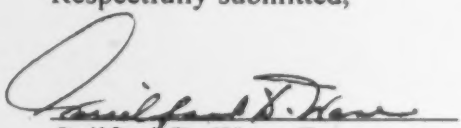
procedures under the Supplemental Admiralty Rules and centuries of precedents under salvage law.

CONCLUSION

The fact that the gold aboard the CENTRAL AMERICA may be the most valuable property ever subject to a salvage award is not justification for the court below to depart from the law of the case and traditional principles of salvage law. This Honorable Court must consider the precedent established by this expansion of maritime salvage law which deprives owners of lost cargo of the possession and enjoyment of salved property. This case also warrants the use of this Court's supervisory powers to avoid a third trial on the issue of ownership of this cargo by requiring the Fourth Circuit to affirm its first mandate. Therefore, petitioners respectfully request that this Court grant a writ of *certiorari* on the two questions presented. In the alternative, petitioners request that this Court summarily reverse the Fourth Circuit's ruling

in CADG II that the Underwriters be required to again prove ownership of the salved property.

Respectfully submitted,



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No. 95-415

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Should this Court exercise its supervisory powers to address contentions never made below that the court of appeals violated the law of the case doctrine when it declined to interpret its prior opinion in the case as having set forth factual findings made in the first instance by the appellate court?

2. Did the district court abuse its broad discretion to fashion a salvage award based on the particular facts of this case?

LIST OF PARTIES

The only party not identified in the list provided in the petition is the Insurance Company of North America, which was a claimant below. Pursuant to Supreme Court Rule 29.1, the Court is advised that respondent has no parent companies or subsidiaries that are not wholly owned.

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Miscellaneous:

3A M. Norris, BENEDICT ON ADMIRALTY (7th ed. 1980) 14

G. Gilmore & C. Black, THE LAW OF ADMIRALTY (2d ed. 1975) 18

D. Steel & F. Rose, KENNEDY'S LAW OF SALVAGE (5th ed. 1985) 14

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

An accurate statement of the proceedings below, curing the artful omissions and mischaracterizations in the petition, makes plain that certiorari review is not warranted.

This is the second round of appellate proceedings in this case, which arises from the discovery by Columbus-America Discovery Group ("Columbus-America") of the 1857 shipwreck SS CENTRAL AMERICA. Columbus-America commenced an admiralty action *in rem* in 1987, seeking confirmation of its title to the wreck. Following Columbus-America's recovery of substantial amounts of antique gold from the shipwreck in 1989, numerous

insurance companies, including petitioners here ("Underwriters"), asserted claims that they were owners of the gold by virtue of having allegedly insured it some 130 years earlier. The ensuing litigation has resulted in two opinions each from the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit, as well as an earlier denial of a petition for certiorari in this Court, No. 92-1189.

The first round of appellate proceedings began in 1990, after the district court awarded Columbus-America the shipwreck and its cargo. The district court had bifurcated the trial, initially addressing the question whether Underwriters had abandoned any claims that they may have had to the antique gold by destroying records or otherwise failing to assert any interest in the sunken vessel and its cargo. In the event Underwriters were found not to have abandoned their claims, the district court would have held further proceedings to determine what amounts, if any, each underwriter had actually insured. After hearing evidence on the first issue, however, the district court was "satisfied that [Columbus-America] ha[d] carried its burden of establishing by clear and convincing evidence that each of the insurance companies [had] long ago abandoned any claim, right, title, or interest *that they may have had* in the gold...." Pet. App. 395a-396a (emphasis added). Accordingly, the district court did not proceed to make any factual findings on each underwriter's ownership claims.

Underwriters appealed, and a divided panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's abandonment holding. Pet. App. 217a-321a. In its opinion, the Fourth Circuit acknowledged the bifurcation of the proceedings below,

and the fact that the second part of those proceedings had never occurred:

> The Court had earlier bifurcated the trial so that the first phase only concerned whether the underwriters had abandoned the gold; should no abandonment be found, a second phase, examining what the underwriters actually insured and setting the proper salvage award, would also be necessary.

Pet. App. 283a; *see also id.* at 242a. The court of appeals also made the following statement:

> The lower court . . . found "*prima facially*" that the underwriters did insure the treasure and that they received ownership interests in the gold once the claims were paid. . . . [W]e find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interest, paid off claims upon and became the owners of the commercial shipment of gold in 1857.

Pet. App. 265a-266a (emphasis in original).

Ultimately, the court of appeals concluded that the recovered gold had not been abandoned. The court of appeals therefore remanded the case with the following instructions:

> On remand, the district court is to apply the law of salvage, and in so doing it must determine what percentage of the gold each underwriter insured. Equally, if not more, important, the Court must also determine the proper salvage award for Columbus-America. Although this is a

> decision that must be left to the lower court, we are hazarding but little to say that Columbus-America should, and will, receive by far the largest share of the treasure.

Pet. App. 274a-275a. Based on the unusual circumstances, the court of appeals also suggested that "the lower court might want to consider denominating the award as a percentage of the total recovery." Pet. App. 278a. This Court denied Columbus-America's interlocutory petition for certiorari on the abandonment issue on March 22, 1993. Pet. App. 399a.

On remand, the district court conducted a two-week trial in the summer of 1993, in which it considered the testimony of dozens of witnesses, thousands of documents, and hundreds of pages of briefs. The district court applied the following factors laid down by this Court many years ago to guide trial courts in fashioning appropriate salvage awards:

> "(1) The labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued."

Pet. App. 120a-121a (quoting *THE BLACKWALL*, 77 U.S. (10 Wall.) 1, 8 (1876)). The district court also considered a seventh factor, which had been articulated by the court of appeals because of the circumstances of this salvage

effort — "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salved." Pet. App. 121a. In the end, the district court concluded: "This is not an ordinary salvage case. The time, energy, worry, skill, the property employed, and the efforts to preserve the site and the artifacts have not been equaled in any other case." *Id.* 125a. It therefore granted Columbus-America a ninety percent salvage award. *Id.* 202a.

The district court declined, however, to make factual findings on whether Underwriters had proved any ownership interest in the gold recovered from the shipwreck, pending further instructions from the court of appeals. The district court observed that it had "made no finding at the 1990 trial as to what amount of gold was aboard the CENTRAL AMERICA, what amount was insured or what sums the insurers paid, or the amount of gold found." Pet. App 176a. Ultimately, although the district court took all of the parties' evidence on ownership, the court concluded that it was uncertain whether the mandate from the court of appeals directed it "to determine which underwriters insured the gold aboard the CENTRAL AMERICA and the amounts insured and paid," so it declined to make any such determination. Pet. App. 181a. The court noted, however, that if its rulings were appealed, "the case can be returned for such a finding." *Id.*

On January 13, 1994, the district court issued an interlocutory order directing Columbus-America to prepare a plan for marketing the recovered gold, which is to be presented for consideration to Underwriters and the district court once this case returns to that court. Pet. App. 203a-216a. This order, which is designed to develop a marketing procedure in which all parties will participate in the decisionmaking, also ensures, as observed by the

Fourth Circuit, that "the district court will retain jurisdiction over the marketing of the gold." *See* Pet. App. 67a.

Underwriters again appealed the district court's rulings on several points, including the court's determination of the proper salvage award and its interlocutory order on marketing. This time, the Fourth Circuit unanimously rejected all of Underwriters' claims. On the salvage award, in particular, the court approved the district court's findings and conclusions on the seven pertinent factors in every respect. Pet. App. 52a-64a. Indeed, the court of appeals went out of its way to underscore its emphatic agreement with the propriety of this salvage award for the "extraordinary" work performed by Columbus-America:

> It will not be often, if ever, that all of the principles governing salvage awards will so overwhelmingly militate in the salvor's favor. It will also be rare that a ship and cargo will have been imperiled for so long, and will be so difficult to objectively value, that a flat percentage award will be preferred to a sum certain. *Nevertheless, this is that exceptional case*, and though the district court's ninety percent award is a generous one, we cannot say that it is excessive.

Pet. App. 61a-62a (emphasis added); *see also id.* 72a ("What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We can say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination."); *id.* 55a ("In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged.").

The Fourth Circuit also affirmed the trial court's establishment of unified marketing, to be administered under the continuing supervision of the district court. Although Underwriters sought to have the gold divided *in specie* — a request that was made for the first time only *after* the second trial — the court of appeals recognized that this approach was simply impractical due to the particular circumstances of this case:

> The difficulty in this case, however, is that there is just too much gold involved to allow more than one party to market it. The loss of the gold aboard the CENTRAL AMERICA significantly affected the precious metal and financial markets in 1857, and there is evidence that the gold's recovery could, upon its re-entry into the market, have a significant effect today.

Pet. App. 65a. The court therefore agreed that unified marketing "is necessary," that it is "eminently sensible" to allow "the party with by far the greater interest in the plan's success to coordinate it," and that any objections or concerns raised by Underwriters could be addressed at any time by the district court, which "will retain jurisdiction over the marketing of the gold." *Id.* 66a-67a.

Finally, the Fourth Circuit addressed the current state of the proceedings on Underwriters' alleged ownership interests. Underwriters argued that the court of appeals had "found" in the previous appeal that "they collectively owned the $1.2 million of insured gold that had been reported lost." Pet. App. 69a. The court rejected this argument, noting the "basic tenet of our legal system that, although appellate courts often review facts found by a judge or jury to ensure that they are not clearly erroneous, they do not make such findings in the first instance." *Id.* (citing *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986)). The

court of appeals reviewed its previous opinion and the statements relied upon by Underwriters in support of their view that the court of appeals had earlier made factual "holdings" that established 100% ownership by Underwriters. The court of appeals noted that its statements occurred in the context of discussing "*prima facie*" showings of ownership, and explained that the passage referred only to the district court's "initial finding that [petitioners] had standing to pursue their claims" as the court had undertaken to resolve the abandonment issue. Pet. App. 70a.

The court of appeals noted the further passages in its previous opinion where it had discussed the consequences of the bifurcation of the original trial, which refuted Underwriters' argument that "a *prima facie* showing is all that is required for [them] to prove their claims." Pet. App. 71a. In sum, the court concluded: "We suppose that we might have more clearly expressed ourselves, but it ought to be crystal clear that a claimant cannot prove his or her claim merely by filing a lawsuit." *Id.* "From the time that the underwriters filed their claim on September 29, 1989, the district court has never made findings concerning the amount of gold aboard the CENTRAL AMERICA that each underwriter — or its predecessor-in-interest — had insured and obtained by subrogation upon paying a claim of loss." *Id.* 67a. The court of appeals therefore remanded the case and instructed the district court to proceed to make factual findings on whether Underwriters can prove that they possess valid ownership rights by showing that they (or their predecessors-in-interest) actually insured the gold in 1857 and paid claims on the losses. *Id.* 72a. Underwriters filed for rehearing and made a suggestion for rehearing *in banc*, which the Fourth Circuit denied without comment. *Id.* 404a.

REASONS FOR DENYING THE PETITION

Underwriters put forward two issues for review here. Neither merits certiorari review, for Underwriters are unable to show that the Fourth Circuit's decision departed from any of the Court's precedents or that a *bona fide* conflict exists among the circuits. Instead, Underwriters merely ask this Court to consider and determine case-specific issues of no general importance beyond the particular facts presented here: (1) whether the Fourth Circuit properly understood statements it made in its own prior ruling in this case; and (2) whether the district court, sitting as a court of equity in the exercise of its admiralty jurisdiction, abused its broad discretion to fashion a salvage remedy by making a percentage award and ordering joint marketing to be administered by the court. These issues would not merit review under any circumstances, and they certainly do not merit review at this interlocutory stage of the proceedings. See R. Stern & E. Gressman, *et al.*, SUPREME COURT PRACTICE 195-198 (7th ed. 1993) (discussing numerous opinions of the Court holding that certiorari should not be granted to review interlocutory orders except in "extraordinary cases"). For all of these reasons, the Court should deny the petition.

I. THIS CASE PRESENTS NO LAW OF THE CASE ISSUE, MUCH LESS ONE MERITING REVIEW

Underwriters begin by urging the Court to exercise its supervisory powers to correct the Fourth Circuit's interpretation of certain passages in its previous opinion that had discussed alleged ownership interests, which Underwriters contend poses an issue under the "law of the case" doctrine. This case presents no opportunity to resolve any such issue, however, for several reasons. Most

fundamentally, Underwriters' contention that the Fourth Circuit "reversed" its prior holding begs the crucial question whether any such holding was ever made. The Fourth Circuit clearly stated that it *had not made* any previous ruling on the ownership issue. Instead, the court flatly rejected Underwriters' attempt to seize on a loose phrase from its earlier opinion as having resolved all factual issues regarding ownership.

While the court of appeals graciously acknowledged "that we might have more clearly expressed ourselves," Pet. App. 71a, the court never suggested it was altering any prior holding. The court of appeals went on to determine that Underwriters' claim — that the *court of appeals itself* had made factual findings on the ownership issue in the first instance and had therefore *proscribed* any such factual findings from being made by the district court — was simply a misreading of the court's previous ruling. *See id.* 69a. Thus, no "law of the case" issue is presented here. Indeed, Underwriters never advanced their law of the case argument in the Fourth Circuit, and it was never addressed below. The issue should not be reviewed here for that reason alone.[1]

Moreover, the Fourth Circuit's treatment of the ownership issue is obviously correct. Underwriters claim that the Fourth Circuit held in its first opinion in this case

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[1] In the Fourth Circuit, taking as their premise that the Fourth Circuit had made factual holdings on ownership, Underwriters argued that it would violate the law of the case doctrine for the district court to conduct further proceedings on the ownership issue. *See, e.g.*, 4th Cir. Reply and Answering Brief of Claimants-Appellants at 36. Underwriters never contended (as they do for the first time here) that the law of the case doctrine compelled the Fourth Circuit judges themselves to adopt Underwriters' strained interpretation of their own opinion.

that they possessed valid ownership rights in the publicly reported commercial gold shipment. Any such "holding" would be dependent upon antecedent factual findings based on evidence that each petitioner (or a proven predecessor-in-interest) had in fact insured portions of the gold shipment and paid losses on the claims. But no such factual findings have ever been made in this case.

The district court has plainly stated that it "made no finding at the 1990 trial as to what amount of gold was aboard the CENTRAL AMERICA, what amount was insured or what sums the insurers paid, or the amount of gold found," *id.* 176a, and it declined to make such a finding in 1993. Thus, Underwriters have never been able to provide a single citation to any such finding by the district court, for there is no such finding. The court of appeals recently confirmed this in the following statement: "From the time that the underwriters filed their claim on September 29, 1989, the district court has never made findings concerning the amount of gold aboard the CENTRAL AMERICA that each underwriter — or its predecessor-in-interest — had insured and obtained by subrogation upon paying a claim of loss." *Id.* 67a.[2]

It may have appeared to Underwriters that the Fourth Circuit misunderstood the status of these proceedings from certain passages of its initial opinion, but in other

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[2] For this reason, the Fourth Circuit's decision below would in any event fall within an exception to the law of the case doctrine which, as acknowledged by petitioners, applies when a prior ruling is clearly erroneous and works a manifest injustice. *See* Pet. 25. The unjustified elimination of any opportunity for Columbus-America to challenge the factual foundation of petitioners' alleged ownership rights would meet both of these criteria. Allowing Underwriters to claim ownership of the treasure recovered through Columbus-America's hard work and investment without requiring proof of their claims would be unjust in the extreme.

passages the court of appeals recognized that the bifurcation of the original trial had caused the ownership issue not to be addressed at that juncture. *See id.* 71a. In any event, as the court of appeals decisively noted, Underwriters' interpretation of the Fourth Circuit's prior opinion has no plausible foundation, for it is "a basic tenet of our legal system" that appellate courts "do not make [factual] findings in the first instance." *Id.* 69a (citing *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986)); *see also Anderson v. Bessemer City*, 470 U.S. 564 (1985).

A third reason why this issue does not warrant review is that Underwriters never contend that the Fourth Circuit applies a different legal standard under the law of the case doctrine than does this Court or the other lower courts. On the contrary, the Fourth Circuit faithfully applies this doctrine in accordance with the same standards followed by other courts. *See, e.g., National Capital Naturists, Inc. v. Board of Supervisors of Accomack County, Va.*, 878 F.2d 128, 131 (4th Cir. 1989); *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 290 (4th Cir. 1982). Thus, the only real question Underwriters raise in this regard is whether the Fourth Circuit erred by failing to apply that doctrine as they wish on the facts of this case. The Fourth Circuit did not err in this respect, as explained above, and in any event, the issue of whether the court misapplied the proper standard is not worthy of review by this Court, particularly in this interlocutory posture.[3]

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[3] On remand, ownership rights will be determined by the district court. If Underwriters' claims are not established, the issues raised by the petition will, in effect, be moot. Petitioners' complaint that these matters will have to be "retried," Pet. 13, is particularly ironic, for Underwriters are well aware that the district court has already taken evidence on the ownership issue. Pet. App. 181a. On remand, therefore, it is likely that the district court will make factual findings on this point without another full trial on the issue.

II. THE DISTRICT COURT'S CASE SPECIFIC EXERCISE OF ITS BROAD DISCRETION IN FASHIONING A SALVAGE AWARD DOES NOT MERIT REVIEW

The second issue raised by Underwriters also does not merit review here. They claim that the salvage award fashioned by the trial court was improper, apparently because they object to the court's decision — consistent with both the Fourth Circuit's mandate and their own request below — to give a percentage award rather than an exact dollar amount, *see* Pet. 34, 37, and because they are not satisfied with the marketing process established by the court.[4] *See id.* at 38-44.

This issue involves nothing more than a case-specific inquiry into whether the district court abused its discretion on the particular facts of this case. Such issues are even less worthy of review in the context of a salvage award, for the Court has emphasized that the trial court's discretion is extremely broad in fashioning such relief, and that it is against public policy to encourage appeals in these matters of discretion. *See, e.g., Hobart v. Drogan*, 35 U.S. (10 Pet.) 107, 119 (1836) (Story, J.) (salvage awards should not be modified on appeal except in cases of "clear and palpable mistake or gross over-allowance"); *see also Oelwereke*

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[4] Petitioners' argument that a percentage award is not appropriate is surprising because petitioners themselves *requested* that such an award be given. In fact, petitioners' post-trial brief to the district court states the following: "Underwriters recommend that the court denominate the salvage award or awards in a percentage or percentages of the recovered treasure. The shares of each of the underwriters likewise should be denominated in percentages." Claimants' Post-Trial Mem. on Salvage Award at 62-63. It would thus be inappropriate for petitioners to obtain discretionary review on this point.

Teutonia v. Erlanger & Galinger, 248 U.S. 521, 524 (1919) (same).[5]

In any event, the district court here properly considered and applied the factors that this Court laid down in *THE BLACKWALL*, 77 U.S. (10 Wall.) at 8, as practical criteria to guide trial courts in exercising their broad discretion to fashion appropriate salvage awards. Applying these factors, the district court made — and the Fourth Circuit upheld — the following findings on the facts of this case:

(1) The labor expended by Columbus-America's team of experts was truly unprecedented among salvage cases, consisting of "some 411,295 hours of labor from 1985 through 1992, at a cost for labor of $8,421,733.66," not including further research work going back more than two decades. Pet. App. 125a. The Fourth Circuit noted, by way of contrast to this "monumental" effort, that "[o]ur research has revealed only two other sunken property cases in which it was reported that the salvor's operations lasted longer than a month." *Id.* 53a.

(2) The promptitude, skill, and energy displayed by Columbus-America far surpassed any previous salvage effort, pushing the boundaries of what had been considered possible by assembling "experts in the various fields of science, archaeology, history, maritime, marketing

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[5] This deferential approach also reflects established principles of general maritime law. "An appellate court is, generally speaking, loath to change a salvage award unless it appears to be based upon incorrect principles, or upon a misapprehension of the facts, or where it is so grossly excessive or inadequate as to be deemed an abuse of discretion." 3A M. Norris, BENEDICT ON ADMIRALTY § 311 (1980). British salvage practice is consistent on this point also. *See* D. Steel & F. Rose, KENNEDY'S LAW OF SALVAGE 457 (5th ed. 1985).

and publicity, to advise and assist in the use, care, and preservation of the shipwreck site." *Id.* 103a. Indeed, the Fourth Circuit simply concluded: "We *cannot imagine* anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Id.* 55a (emphasis added).

(3) The value of the property employed by Columbus-America, including the remotely operated, undersea robot NEMO, which it invented, exceeds $6 million, and "Columbus-America rented additional equipment and incurred related expenses of millions more." *Id.* 56a. Once again, "no case reports a salvor to have employed property of a comparable value." *Id.* All of this property was also in frequent danger during at-sea operations 180 miles from the shore.

(4) The risk incurred during Columbus-America's maritime operations was substantial, and "the 487 days that it spent at sea multiplied the intrinsic risks accordingly." *Id.* 57a.

(5) The value of the property saved from the shipwreck is immense; "when the salvage is completed and all the treasure is eventually sold, the haul will be one of the largest in history." *Id.* 57a. On this point, however, it is significant that the antique gold is inherently difficult to value, and its actual valuation will necessarily depend on the manner in which it is marketed. "[A] unified plan is necessary to ensure the maximum return from the sale of the gold." *Id.* 66a. "If the gold must eventually be sold at a discount, it is Columbus-America that will suffer no less than ninety percent of the damage." *Id.* 66a-67a. That is why the district court has provided for marketing under its own auspices and control, so as to protect the value of the *res*.

(6) Columbus-America's recovery exemplifies "the ultimate rescue from the ultimate peril." *Id.* 59a. The Fourth Circuit reached this conclusion by recognizing that the shipwreck salvaged in this case was essentially reduced to a "state of oblivion" after it had been lost in the deep ocean for well over a century. *Id.* 58a.

Finally, the courts below also weighed a seventh factor, which was the salvor's efforts to preserve the historical and archaeological value of the shipwreck and its contents. Here the courts determined that Columbus-America had taken "extraordinary care" in this regard, and that "the efforts to preserve the site and the artifacts have not been equaled in any other case." *Id.* 60a, 125a.

From this account, it is clear that the facts of this case are unique and that the composite picture of Columbus-America's salvage efforts unparalleled in maritime practice. The Fourth Circuit plainly took this view, and therefore concluded that the award fashioned in this case was well within the district court's broad discretion:

> It will not be often, if ever, that all of the principles governing salvage awards will so overwhelmingly militate in the salvor's favor. It will also be rare that a ship and cargo will have been imperiled for so long, and will be so difficult to objectively value, that a flat percentage award will be preferred to a sum certain. *Nevertheless, this is that exceptional case*, and though the district court's ninety percent award is a generous one, we cannot say that it is excessive.

Id. 61a-62a (emphasis added).[6]

Underwriters nonetheless ask the Court to grant plenary review to consider the form of this award. They do not question the size of the award; indeed, they acknowledge that it "did not result in a manifest injustice." Pet. 31. Rather, their argument seems to be that the courts below erred by providing a salvage award denominated as a percentage, rather than as a fixed dollar amount.[7] This specific issue is not worthy of review for several reasons.

First, a percentage award was granted here because of the particular facts presented in this case. This salvage effort is unprecedented. The shipwreck is 1½ miles below the surface of the Atlantic Ocean and 180 miles off the Carolina coast. Because of unfavorable weather patterns (including severe hurricanes and tropical storms) and the difficulty of conducting operations on the high seas, the weather window for salvage efforts is limited. Recognizing these facts, the Fourth Circuit advised that "the lower court might want to consider denominating the award as a percentage of the total recovery." *Id.* 278a. The district court followed that sensible advice, and it did not abuse its discretion in doing so. Moreover, that narrow, case-specific determination is not of any general import.

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[6] This Court has also stressed that salvage awards should "generally [be] quite liberal to encourage volunteer action taken to preserve life and property subject to the perils of the sea." *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804) (Marshall, C.J.).

[7] The irony of Underwriters' argument is particularly glaring in light of the fact that it was the Underwriters who argued below for an *in specie* percentage division of the antique gold. *See* Pet. App. 14-15.

At first glance, Underwriters appear to make the incorrect suggestion that no prior decision can be found in which a salvage award was expressed in terms of percentages. Pet. 33-38. Upon closer examination, however, their position is more elusive, for they hedge their point much more narrowly by restating that they "have uncovered not a single case where a salvage award was based *on the percentage of the proceeds of a judicial sale which had not occurred before the award*." *Id.* at 38 (emphasis added). This is a significant shift, because all the parties in this case are aware that admiralty courts *often* express salvage awards in terms of a percentage of the value of the *res*. *See, e.g.*, G. Gilmore & C. Black, THE LAW OF ADMIRALTY § 8-10, at 536 (2d ed. 1975) (discussing cases involving percentage awards). Indeed, in the brief Underwriters submitted to the Fourth Circuit in this very case, they discussed the salvage issue in precisely these terms. *See, e.g.,* 4th Cir. Br. of Claimants-Appellants at 37 (discussing practice of denominating salvage awards as a percentage of the recovery).

The only real complaint made by Underwriters, therefore, is that the courts below in this case approved a salvage award expressed in percentage terms *before* the property had been sold. In an ordinary salvage case, of course, the property already has been recovered and can be accurately valued or sold without delay. The difficulty in *this* case — which to date is *unique* to this case — is that it will take many additional years to market the antique gold appropriately.

The special marketing problems presented in this case bear distinct emphasis in this connection. The Fourth Circuit noted that "there is just too much gold involved to allow more than one party to market it," Pet. App. 65a, and "that separate marketing of the gold would be less efficient and inevitably result in a lower total return," *id.*

at 66a n.24. The evidence in this case showed that the marketing of this large amount of gold could have "a significant effect" on "the precious metal and financial markets." *Id.* In other words, the disposition of the antique gold must be managed very carefully under the district court's auspices; if it is sold too quickly, the result could be a severe depression of the prices obtained in the marketplace, with the result that the salvor would end up with nothing to show for its extraordinary efforts. The district court thus determined that it would be necessary to develop a joint marketing plan, and issued an interlocutory order to guide this process. *Id.* 203a-216a.[8]

Underwriters complain that this order effectively vests title to the gold in Columbus-America and deprives them of their supposed ownership rights (which, again, have not yet been determined). Pet. 38-44. This is inaccurate. The court's interlocutory rulings impose safeguards and controls on the marketing and sale of the gold. Columbus-America is appointed as central authority to propose a marketing program, but that program is to be presented to the court *and to Underwriters* for consideration, and both parties are authorized to designate representatives to participate in marketing decisions. Pet. App. 205a-207a. Underwriters' complaints about the putative effects of the district court's interlocutory marketing order are easily refuted simply by examining the safeguards set forth in the district court's order. *See* Pet. App. 203a-216a.

This case thus vindicates the general principle of maritime law that the fashioning of an appropriate salvage award must be left within the broad discretion of the trial

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[8] It would be premature to address the details of marketing the antique gold at this time, because the district court has not yet considered or adopted a specific marketing plan.

court on the facts of each case. "Each [salvage] case depends so largely on its own particular facts and circumstances that it is difficult to obtain much assistance from adjudicated decisions." *THE BOYNE*, 98 F. 444, 447 (D. Va. 1899); *see also THE HAXBY*, 83 F. 715, 718 (4th Cir. 1897) ("It is hardly safe to make comparisons of cases of this character . . . . The dissimilar facts are generally so marked . . . as to render the decision in one case an unsafe guide in another."). The sensible rulings made by the courts below implicate no broad legal standards that transcend the particular facts of this case. Accordingly, they are not appropriate for certiorari review.

Underwriters contend that the Fourth Circuit's decision in this case conflicts with the Fifth Circuit's decision in *Platoro, Ltd. v. Unidentified Remains*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), and with a district court ruling that was affirmed without comment by the Eleventh Circuit in *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985). This contention is unpersuasive. Each case involved situations where the claim was made that a proper disposition of the *res* would be to award title to the salvor outright. In each case, this claim was rejected because it was determined that an award of title to the salvor would be inappropriate on the facts presented. *Platoro*, 695 F.2d at 903-04; *Chance*, 606 F. Supp. at 808. No similar situation is presented in this case; the courts below directed that a marketing plan be developed that the district court will supervise pursuant to its continuing jurisdiction over the *res*.[9]

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[9]Underwriters below acknowledged that unified marketing of the antique gold is "preferable." *See* 4th Cir. Brief of Claimants-Appellants 46. In light of this fact, their argument that the district court's unified marketing plan constitutes an abuse of discretion is meritless on its face.

In addition, the facts of *Platoro* and *Chance* range very far afield from the facts of this case. In *Platoro*, the Fifth Circuit found the forced sale of the *res* to be inappropriate because of the sovereign interests of the State of Texas, which "has a strong interest in keeping the *res* because of its historical significance to the State." 695 F.2d at 903. In that case, no owner had come forward to claim the property, which had been recovered from a shipwreck; the State of Texas acted as substitute custodian and ultimately was declared the owner of the *res*. *Id.* at 897, 902. The unusual facts of *Platoro* are thus quite different from the facts of this case, and the same considerations are not applicable here.

In *Chance*, the district court actually found that the salvors had failed to prove all the elements necessary to establish a valid salvage claim, and that any salvage claim against the State of Georgia would in any event be barred by the Eleventh Amendment. *See* 606 F. Supp. at 808-09. Once again, these circumstances are vastly different from the situation presented in this case. Rather than posing any conflict with the ruling below, therefore, these decisions merely serve to reinforce the widely understood principle that — as well stated by the court that decided *Platoro* — "no precise formula has been or can be described for calculating salvage awards." *Allseas Maritime, S.A. v. M/V MIMOSA*, 812 F.2d 243, 246 (5th Cir. 1987).

A final reason for denying certiorari on Underwriters' second question is that the issues thus raised are not appropriate for review in the current interlocutory posture of these proceedings. Underwriters' disagreements with the salvage award and the joint marketing proposed by the district court are premised on their underlying claims that each of them possesses some form of ownership rights in the gold in question. Their ownership claims, however,

have not yet been judicially determined, and the court below has now remanded this case to the trial court with directions to make factual findings in this regard. As noted above, the results of the proceedings on remand could therefore entirely eliminate any need for this Court to consider and decide the merits of the issues raised in Underwriters' second question. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (certiorari denied *per curiam* "because the Court of Appeals remanded the case [and thus it was] not yet ripe for review by this Court").

CONCLUSION

For the foregoing reasons, the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Respondent.

Petition for Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Although the reasons which warrant the grant of a writ of *certiorari* are adequately stated in the petition, a brief reply is necessary to correct assertions contained in the Brief in Opposition filed by Columbus-America Discovery Group (CADG).

The assertions by CADG which require correction and

comment are grouped within three issues.

1. *The Law of the Case Issue.*

(a) The Petition asserts that the Fourth Circuit in CADG I, held that the Underwriters were the owners of the commercial shipment of gold carried by the S.S. CENTRAL AMERICA, and therefore, pursuant to the law of the case doctrine, the court is precluded from revisiting this decision. *United States v. County of San Diego*, 53 F.3d 965 (9th Cir. 1995). Respondent alleges that the law of the case doctrine does not apply because the Fourth Circuit never made a determination regarding ownership of the gold cargo. CADG cited the court's explanation in CADG II that such a determination was not made as evidence of this position. Although Petitioners admit that the Fourth Circuit denied the clear meaning of its words in CADG I, this denial is somewhat disingenuous in the context of this litigation.

The Fourth Circuit had many opportunities to reconsider the effect of its mandate in CADG I and repeatedly, refused to do so. Judge H. Emory Widener, Jr. dissented to the majority opinion in CADG I on the basis that the court was engaging in improper fact-finding. The majority was not persuaded by this argument and failed to even comment on Judge Widener's dissent.[1] CADG raised

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[1]Judge Widener surmised, (Pet. App. at 313-314a) that the CADG I majority determined that a finding of ownership was a necessary element of the trial court's finding of abandonment, a finding which was supported by the following discussion of the ownership evidence in the trial court's opinion:

> Insurance Companies rely solely upon the newspaper accounts for evidence that they

the fact-finding issue again in a Motion for Reconsideration and Suggestion for Re-hearing *In Banc* immediately following CADG I, and again the majority was unpersuaded by this argument. During the second trial of this matter, both the Underwriters[2] and the trial judge interpreted the Fourth

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> were insurers, the name of the insured, the amount of the insurance, the value of the shipment, whether a claim was made, what sum was supposedly paid, and to whom. They well must rely on the newspaper articles for they have no copies of any insurance policies, invoices for shipments, proof of loss, amounts paid or other records. *Without the newspaper accounts*, the evidence is totally insufficient to establish any claim of the insurance companies.

Pet. App. at 372a. (Emphasis added.)

The trial court determined in the same opinion that newspaper accounts recounting the events surrounding the sinking of the CENTRAL AMERICA would be admissible as ancient documents. Pet. App. at 377a. Consequently, it would not only be reasonable, but also necessary, for the majority in CADG I to presume that a finding of ownership had been made by the trial court in conjunction with the finding of abandonment.

[2]The Underwriters, in the second trial, prepared and submitted to the trial judge a stipulation which set forth the various percentages of claims that each Underwriter paid at the time of the loss. The Underwriters did so with the understanding that this stipulation would satisfy the first portion of the mandate in CADG I, and the trial judge would be left with determining the salvage award.

Circuit's opinion in CADG I as having resolved the ownership issue.[3]

The Fourth Circuit was given a third opportunity to clarify this alleged misunderstanding when CADG filed a Motion for Clarification following the second trial, requesting that the issue of ownership and the Fourth Circuit's mandate be clarified. Once again, the Fourth Circuit refused to clarify this mandate. Pet. App. at 398a. Therefore, considering the repeated allegations made to the majority by Judge Widener's dissent and CADG that a factual finding regarding ownership had been improperly made by the Fourth Circuit, it stretches the boundaries of reason to accept the Fourth Circuit's explanation in CADG II that the previous mandate had been misunderstood.[4]

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[3]Not only did the trial judge and the Underwriters believe the Fourth Circuit made such a determination, the published opinion contained a West Publishing Company headnote which reported such a determination was made. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 453 (4th Cir. 1992), *cert. denied*, 123 L. Ed. 2d 183, 113 S. Ct. 1625 (1993) (headnote 11).

[4]To add insult to injury, reliance upon the CADG I opinion not only cost the parties a huge amount of time and expense to litigate the issue of the salvage award before it was ripe, but the court also nonchalantly discarded the Underwriters' position that ownership was proven by stating in CADG II: "...it ought to be crystal clear that a claimant cannot prove his or her claim merely by filing a lawsuit." Pet. App. at 71a.

For the sake of accuracy, Petitioners did not file this lawsuit. The Fourth Circuit apparently ignored the laundry

(b) The Respondent's contention that the trial court made no findings of fact regarding ownership of the gold is contradicted by its own cross-appeal in CADG I. In CADG II, the Respondents and the Fourth Circuit asserted that the trial judge bifurcated the proceedings in a manner which caused the ownership issue not to be addressed in the first trial. If this was true, why did CADG appeal the trial court's ruling in the first trial on the grounds that ownership had not been proven? Pet. App. at 265. a CADG's own argument to the Fourth Circuit induced the court to believe, correctly, that a finding of ownership was at least a necessary implication of the trial court's finding of abandonment. Having raised this issue during the CADG I appeal, CADG was estopped from attempting to undo the results of this argument because the Fourth Circuit's opinion in CADG I was not favorable.

(c) Despite Respondent's assertions to the contrary, the Fourth Circuit in both CADG I and CADG II interpreted the trial court's ruling as establishing that the Underwriters made a *prima facie* case of ownership. If uncontradicted by admissible evidence, this clearly means that the Underwriters have proven their claims of ownership of the commercial shipment of gold. Considering that both CADG and the Underwriters have twice presented evidence on the ownership issue, unless the Fourth Circuit once again did not mean what it wrote, the record is complete and there is no further evidence to contradict the Underwriters' *prima facie* case, and the Underwriters are the lawful owners of the gold. Consequently, the issues presented in this petition are ripe for consideration.

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list of evidence the Underwriters presented in the first trial to prove ownership, a list which the court itself recounted in support of its affirmation of the ownership determination in CADG I. Pet. App. at 264-266a.

2. *The Title To The Salved Property Issue.*

The Underwriters' primary objection to the trial court's salvage award is that, due to the manner in which the award was made, under no circumstances will the owners of the property retain title to any portion of the property which was salved on its behalf. Respondent's arguments concerning the merits of the salvage award are self-serving, inappropriate and irrelevant.[5] The single issue regarding the salvage award raised in the petition is whether the trial court had the authority to divest the Underwriters of ownership of the *res* to ensure that the salvor received the highest market value possible for the property at judicial sale.

The Underwriters' argument in the petition does not contradict its earlier positions regarding the salvage award. Pursuant to traditional maritime salvage law, the owner of salved property is entitled to retain ownership of the property which has been lost.[6] Judicial discretion does not empower trial courts to circumvent the very foundations of salvage law, *i.e.*, to return distressed property to its owner, in order to ensure that the salvor realizes the maximum profit on the endeavor.

The Underwriters' previous request that the salvage award be made *in specie*, by defining the salvage award as a percentage of the *res*, is entirely consistent with the current position that they are entitled to title, possession and control over a percentage of the salved property. However, to establish the salvage award as a percentage of a judicial sale which has not taken place results in the complete divestiture of the Underwriters' ownership interests in the gold cargo.

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[5]See Respondent's Brief in Opposition pp. 14-17.

[6]See Petition for Writ of *Certiorari* pp. 36-38.

The Respondents, the trial court and the Fourth Circuit have cited no judicial authority for defining a salvage award in this manner. This award breaches the trial court's broad equitable powers to fashion a salvage award pursuant to the rules of admiralty.

This Honorable Court established in *Hobart v. Drogan*, 10 Pet. 108 (1836), that it was against sound policy and public convenience to encourage appeals of salvage awards, unless there has been some violation of just principles which ought to regulate the subject. *Id.* at 35-36. This dispute focuses on the violation of the salvage principle that the owner of salved property retains the ownership interest unless the salvage award cannot be paid.

Respondent's Brief in Opposition fails to address the issue of the Underwriters' ownership interest in the salved property. Respondent correctly asserts that an overwhelming number of salvage cases establish a salvage award as a percentage of the *res*. Those cases also judicially establish a value of the *res* at the time of the award by weighing the competing evidence of value and selecting a value based upon this competing evidence. The only unique factor in this case is that the salvor would like the court to ignore the current market for the gold cargo, and instead speculate as to the value of the gold in an inflated marketplace which the salvor may be able to create five years from now.

Both the Respondent and the trial court fail, however, to identify any authority for the court's refusal to place a value on the *res*, or authority to delay the judicial sale of the *res* for years to permit the development of an inflated market which does not exist and may never exist. The courts' assistance in this game of speculation is both unprecedented and improper pursuant to the Supplemental Rules of Admiralty.

3. *The Marketing Plan Issue.*

Respondent's Brief in Opposition artfully avoids the central problem involving the judicial sale of the gold. The trial court's designation of CADG, a party to this litigation, as the central authority for sale of the *res*, violates Supplemental Admiralty Rule E(9)(c) which precludes parties in interest from making a sale. It is clear from the trial court's marketing order that the Underwriters will not have an equal hand in marketing and selling the gold, but will merely have the power to voice objections to the trial court. Pet. App. at 213a. The Underwriters will not be equal partners in developing the marketing plan and will at no time have possession of, or even access to, the gold pursuant to this order.

Petitioners agreed at one point in the litigation that a unified marketing plan, devised and executed by an independent third party authority, would be an appropriate means of liquidating the *res*. It became clear that, despite the trial court's obligation to do so, the court intended to reject the third party plan and adopt the salvor as the central authority for sale of the gold. Petitioners objected to this deviation from the Supplemental Admiralty Rules and were forced to adopt a secondary position, requesting that the gold be divided *in specie* rather than be sold by the salvor alone.

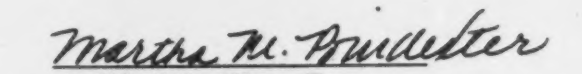
The trial court adopted the salvor's marketing plan because the Underwriters and the salvor refused to agree on a particular plan. Pet. App. 204-205a. Remarkably, the Underwriters' *refusal to deviate from* the Supplemental Admiralty Rules' requirement that the sale be conducted by a person not a party in interest resulted in the trial judge adopting the salvor's plan. Pet. App. 204-205a. The trial court offered no explanation for this obvious deviation from the rules, except that CADG had studied the markets and had

a far greater interest in the successful and proper marketing of the gold. Pet. App. 205a. Supplemental Admiralty Rule E(9)(c) does not provide for such an exception and the Petitioners have been unable to identify a single case where a trial judge has exercised such a broad degree of discretion.

CONCLUSION

In summary, Respondent's Brief in Opposition has failed to address Petitioners' primary legal arguments. This Court's supervisory powers must be invoked to determine if the Fourth Circuit's opinion in CADG II violates the law of the case doctrine. This Court must also determine the proper extent of a trial court's discretionary powers in the realm of salvage law, particularly regarding the rights of the owner of salved property and the authority of the trial judge to order that a judicial sale be conducted by a party to the litigation. For the foregoing reasons, as well as those which have been urged in the petition, a writ of *certiorari* should be granted.

Respectfully submitted,



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EDITOR'S NOTE

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No. 95-415

IN THE
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OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, *ET AL.*
Petitioners,
v.
COLUMBUS-AMERICA DISCOVERY GROUP,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S MOTION TO SEAL

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12 pp

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RESPONDENT'S MOTION TO SEAL

Respondent Columbus-America Discovery Group ("Columbus-America"), by counsel, hereby respectfully moves this Court to seal the Appendix previously filed by Petitioners in this case, and to require that Petitioners submit new copies of the Appendix so as to safeguard material previously placed under seal in this matter by the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit.[1/] In support of this Motion, Columbus-America states as follows:

1. This is an admiralty action arising from Columbus-America's location and recovery of the shipwreck *SS Central America*, which sank in 1857. Columbus-America commenced an

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[1/] Pursuant to Supreme Court Rule 29.6, Columbus-America states that it has no parent companies or subsidiaries that are not wholly owned.

admiralty action *in rem* in 1987, seeking confirmation of its title to the wreck. Following Columbus-America's recovery of substantial amounts of antique gold from the shipwreck in 1989, numerous insurance companies, including Petitioners here ("Underwriters"), asserted claims that they were owners of the antique gold by virtue of allegedly having insured it some 130 years earlier. The ensuing litigation has resulted in two opinions each from the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit, and denial of an earlier petition for certiorari in this Court, No. 92-1189.

2. During the litigation, issues have arisen relating to the location of the shipwreck and the marketing of the antique gold recovered from the site. This information is highly confidential, and its disclosure could result in severe damage to Columbus-America. Disclosure of the location and layout of the shipwreck site, for example, would allow unscrupulous parties to attempt undersea theft of items from the shipwreck site. The record in this case already indicates that the shipwreck has been threatened by interlopers, making confidentiality of the wreck's location extraordinarily important. Likewise, the premature release of proprietary information about marketing and details of the antique gold could have a severe adverse impact on the marketing program.

3. In recognition of the sensitivity of the information described in paragraph 2 above, the district court and the court of appeals have entered orders sealing briefs and exhibits so as to protect the information from disclosure. For this reason, the district court also issued certain pages of its November 18, 1993 Order (Pet. App. 184a-194a), as well as its Order of January 13, 1994 (Pet. App. 203a-216a) under seal. This record material was also sealed by the court of appeals.

4. On or about September 12, 1995, Underwriters filed a Petition for Certiorari, seeking review of the June 14, 1995 decision of the court of appeals. Underwriters filed an Appendix together with this Petition, which reproduced the sealed material described in paragraph 3 above. Underwriters failed, however, to take the proper steps for preserving the confidentiality of this material. Underwriters did not file a motion for leave to file under seal as required by this Court's procedures. Instead, Columbus-America is advised that Underwriters filed their Petition and Appendix without any notice to the Clerk of this Court of the confidentiality concerns, save for a typewritten notation of "under seal" on the cover of the documents. As a result of their failure to follow the proper procedures, Underwriters have caused the entire Petition and Appendix to be docketed and made publicly available, in violation of the orders of the court of appeals and district court. Underwriters' failure to protect the sealed information threatens to cause serious harm to Columbus-America.

5. Although Underwriters apparently intended that their entire Petition and Appendix be sealed, Columbus-America does not believe that the Petition itself contains confidential information beyond that already disclosed in the Fourth Circuit's published opinions. On the same basis, Columbus-America does not seek to have its Brief in Opposition, also filed today, placed under seal. As requested by the office of the Clerk, Columbus-America has specified below the pages of the Appendix, representing sealed portions of a district court opinion and order, that should be placed under seal.

WHEREFORE, Columbus-America respectfully requests that this Court enter an Order providing as follows:

(a) That the Appendix previously filed in this case be SEALED and be used solely for purposes of the disposition of the Petition, and that the Clerk of this Court withhold all copies of this document from access by any persons not officers or employees of the Court; and

(b) That the Court require Underwriters to take appropriate steps to file new copies of their Appendix with the materials found on pages 184a-194a and 203a-216a of the Appendix properly filed under seal; and

(c) That the Court grant such other and further relief as it deems appropriate under the circumstances to protect Columbus-America from Underwriters' failure to follow this Court's procedures and the orders of the district court and court of appeals.

Columbus-America also respectfully requests that the Court fashion its Orders and procedures in this matter so as not to delay the disposition of the Petition. The continued pendency of the litigation continues to cause harm and disruption to Columbus-America's exploration activities. Columbus-America respectfully asks that the Court use the Petition and Appendix already in the Court's possession for disposition of the Petition if this is necessary to avoid delay.

Respectfully submitted,

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September 26, 1995

Counsel for Respondent

No. 95-415

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for the Fourth Circuit

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that this 26th day of September, 1995, three copies of the foregoing Respondent's Motion to Seal in the above styled case were deposited in the U.S. Mail, first class postage prepaid, addressed to each of the following:

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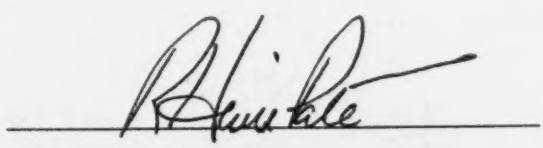

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September 26, 1995

By Hand

Francis J. Lorson, Esq.
Deputy Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Atlantic Mutual Insurance Company, et al
v. Columbus-America Discovery Group, No. 95-415

Dear Mr. Lorson:

Enclosed for filing in the above-styled matter are 41 copies of Respondent's Brief in Opposition. Also enclosed are an original and 11 copies of Respondent's Motion to Seal.

Please file stamp one copy of the Opposition and one copy of the Motion and return them to the bearer of this letter.

Thank you for your assistance in this matter.

Yours sincerely,

R. Hewitt Pate

rhp/cls
Enclosures
cc: Counsel of Record

No. 95-415

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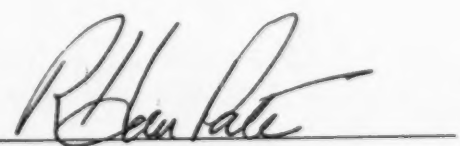

R. Hewitt Pate